

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GREGORY MARK McCARTHY,

Petitioner,

No. C 07-3933 PJH (PR)

vs.

**ORDER TO SHOW CAUSE**

IVAN D. CLAY, Warden,

Respondent.

Petitioner, a California prisoner currently incarcerated at the Sierra Conservation Camp in Jamestown, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the filing fee.

Venue is proper because the conviction was obtained in Santa Clara County, which is in this district. See 28 U.S.C. § 2241(d).

**BACKGROUND**

A jury convicted petitioner of one count of arson of an inhabited structure. See Cal. Penal Code § 451(b). The jury found true allegations that he had used devices designed to accelerate the fire and to delay ignition, see Cal. Penal Code § 451.1(a)(5), and that he had intentionally caused damage exceeding \$1 million, see Cal. Penal Code § 12022.6(a)(3). The conviction on the first count arose out of a fire that destroyed the home of petitioner's ex-wife's divorce lawyer. Petitioner was also convicted of one count of presenting a false and fraudulent insurance claim, see Cal. Penal Code § 550(a), regarding an unrelated fire at a karate studio that he owned. He was sentenced to seventeen years in prison, and was also ordered to pay restitution in excess of \$2.3 million to the victims of the house fire and their insurers. *People v. McCarthy*, 2002 WL 1767612, \*1 (Cal.App. 2002). Petitioner

1 unsuccessfully appealed his conviction to the California Court of Appeal and the Supreme  
2 Court of California denied review. His state habeas petitions were denied.

### 3 DISCUSSION

#### 4 A. *Standard of Review*

5 This court may entertain a petition for a writ of habeas corpus "in behalf of a person  
6 in custody pursuant to the judgment of a State court only on the ground that he is in  
7 custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §  
8 2254(a). It shall "award the writ or issue an order directing the respondent to show cause  
9 why the writ should not be granted, unless it appears from the application that the applicant  
10 or person detained is not entitled thereto." *Id.* § 2243.

11 Habeas corpus petitions must meet heightened pleading requirements. *McFarland*  
12 *v. Scott*, 512 U.S. 849, 856 (1994). A petition must "specify all the grounds for relief" and  
13 set forth "facts supporting each of the grounds thus specified." Rule 2(c), Rules Governing  
14 Section 2254 Cases in the Federal District Courts, 28 U.S.C. foll. § 2254. "[N]otice'  
15 pleading is not sufficient, for the petition is expected to state facts that point to a 'real  
16 possibility of constitutional error.'" *Id.*, Rule 4 Advisory Committee Notes (quoting *Aubut v.*  
17 *Maine*, 431 F.2d 688, 689 (1st Cir. 1970). "Habeas petitions which appear on their face to  
18 be legally insufficient are subject to summary dismissal." *Calderon v. United States Dist.*  
19 *Court (Nicolaus)*, 98 F.3d 1102, 1108 (9th Cir. 1996) (Schroeder, J., concurring).

#### 20 B. *Legal Claims*

21 As grounds for federal habeas relief, petitioner asserts that: (1) His Sixth  
22 Amendment right to trial by jury was violated by the sentencing court's selection of the  
23 upper term for his sentence based on facts not tried to the jury and found by it beyond a  
24 reasonable doubt; (2) his trial counsel was ineffective in not raising the first issue as to the  
25 sentences imposed; (3) his appellate counsel was ineffective because he "failed to raise on  
26 appeal a meritorious[] "Dead Bang" issue; (4) petitioner's claim as presented in issue one is  
27 based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which was decided before his  
28 conviction was final, so no retroactive application was necessary and the superior court

1 erred in denying his habeas petition on grounds that *Blakely v. Washington*, 542 U.S. 296  
2 (2004), is not retroactive; and (5) even if his claim as set out in issue one requires  
3 retroactive application, it comes within an exception to *Teague v. Lane*, 489 U.S. 288  
4 (1989), for watershed new rules, so the superior court erred in denying his state habeas  
5 petition.

6 In claim three petitioner has failed to “state facts that point to a ‘real possibility of  
7 constitutional error,’” see Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431  
8 F.2d 688, 689 (1st Cir. 1970), because he provides no explanation of what the phrase  
9 “dead bang” might mean, and no further explanation of what he contends appellate counsel  
10 should have raised beyond that conclusory statement. The claim will be dismissed.

11 Issues four and five will be dismissed because they are really arguments as to why  
12 the alleged constitutional violation by the sentencing court can be grounds for habeas relief,  
13 not independent grounds in themselves. The arguments in those issues are applicable to  
14 whether this court should grant relief, and will be considered to that extent.

### 15 CONCLUSION

16 For the foregoing reasons and for good cause shown,

17 1. Issues three, four and five are **DISMISSED**.

18 2. The clerk shall serve by regular mail a copy of this order and the petition and all  
19 attachments thereto on respondent and respondent's attorney, the Attorney General of the  
20 State of California. The clerk also shall serve a copy of this order on petitioner.

21 3. Respondent shall file with the court and serve on petitioner, within sixty days of  
22 the issuance of this order, an answer conforming in all respects to Rule 5 of the Rules  
23 Governing Section 2254 Cases, showing cause why a writ of habeas corpus should not be  
24 granted. Respondent shall file with the answer and serve on petitioner a copy of all  
25 portions of the state trial record that have been transcribed previously and that are relevant  
26 to a determination of the issues presented by the petition.

27 If petitioner wishes to respond to the answer, he shall do so by filing a traverse with  
28 the court and serving it on respondent within thirty days of his receipt of the answer.

1           4. Respondent may file a motion to dismiss on procedural grounds in lieu of an  
2 answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules Governing  
3 Section 2254 Cases. If respondent files such a motion, petitioner shall file with the court  
4 and serve on respondent an opposition or statement of non-opposition within thirty days of  
5 receipt of the motion, and respondent shall file with the court and serve on petitioner a reply  
6 within fifteen days of receipt of any opposition.

7           5. Petitioner is reminded that all communications with the court must be served on  
8 respondent by mailing a true copy of the document to respondent's counsel. Petitioner  
9 must keep the court informed of any change of address and must comply with the court's  
10 orders in a timely fashion. Failure to do so may result in the dismissal of this action for  
11 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b). See *Martinez v.*  
12 *Johnson*, 104 F.3d 769, 772 (5th Cir. 1997) (Rule 41(b) applicable in habeas cases).

13           **IT IS SO ORDERED.**

14           Dated: August 27, 2007.



\_\_\_\_\_  
PHYLLIS J. HAMILTON  
United States District Judge

15  
16           G:\PRO-SE\PJH\HC.07\MCCARTHY3933.OSC.wpd  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

GREGORY M. MCCARTHY,

Case Number: CV07-03933 PJH

Petitioner,

**CERTIFICATE OF SERVICE**

v.

IVAN D. CLAY,

Respondent.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 27, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Gregory Mark McCarthy [P-74044] 59-07  
Sierra Conservation Center  
5150 O'Byrnes Ferry Road  
Jamestown, CA 95327

Dated: August 27, 2007



Richard W. Wieking, Clerk  
By: Nichole Heuerman, Deputy Clerk